In 1914 Judge Cardozo, later a Judge of this court, in the case of *In re Grand Boulevard and Concourse*, 212 N. Y. 538, 544, involving the City of New York, stated in part:

> "Before the citizen's right to compensation can be cut off by such a statute of limitation, notice of the event on which the right depends must be brought home to him by the state. He cannot be charged with the duty of hunting out the facts for himself. The state is appropriating his property by proceedings *in invitum*, and it cannot shift upon him the burden of ascertaining that the proceedings are in motion. It must give him notice reasonably adopted to bring their pendency to his attention."

We submit that for a proceeding that was originally instituted by the appellee in 1927 for a taking which was not to take place until the year 1952, where the petition herein, the notice, the papers, and the order of appointment of appraisers had not been filed in any County Clerk's Office until May 29, 1952, and where no copies of the papers or order of the appointment of appraisers or of the notice of any hearing, or of the time and/or place of the sitting of the commissioners of appraisal had been given or served upon appellant so that a claim may be presented to them as such commissioners by the appellant, did not bring home to the appellant and others similarly situated, the notice reasonably calculated of the pendency of these proceedings.

(C) The statute (Water Supply Act) is defective on its face for failure to provide any form of personal notice. On almost similar facts this Court in *Walker vs. City of Hutchinson, Kansas*, 352 U. S. 112 (1956), said amongst other things:

> "The only question we find it necessary to decide is whether, under circumstances of this kind, newspaper publication alone measures up to the

quality of notice the Due Process Clause of the Fourteenth Amendment requires as a prerequisite to proceedings to fix compensation in condemnation cases.

"It cannot be disputed that due process requires that an owner whose property is taken for public use must be given a hearing in determining just compensation. The right to a hearing is meaningless without notice. In *Mullane v. Central Hanover Bank and Trust Co.*, 339 U. S. 306, we gave thorough consideration to the problem of adequate notice under the Due Process Clause. That case establishes the rule that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests. We there called attention to the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions. We recognized that in some cases it might not be reasonably possible to give personal notice, for example where people are missing or unknown.

"Measured by the principles stated in the *Mullane* case, we think that the notice by publication here falls short of the requirements of due process. It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property. In *Mullane* we pointed out many of the infirmities of such notice and emphasized the advantage of some kind of personal notice to interested parties. In the present case there seem to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the city and was on the official records. Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value.

* * * * * * *

> "There is nothing peculiar about litigation between the Government and its citizens that should deprive those citizens of a right to be heard. Nor is there any reason to suspect that it will interfere with the orderly condemnation of property to preserve effectively the citizen's rights to a hearing in connection with just compensation. Notice by publication in too many instances is not notice at all. It may leave government authorities free to fix one-sidedly the amount that must be paid owners for their property taken for public use."

In the light of the *Mullane* and *Walker* cases, it seems clear that the statute was defective and deprived this appellant of her property without due process of law.

(D) The appellant had been deprived of her property without due process of law and without just compensation. No award had been made or compensation paid to the appellant or to others similarly situated.

It seems to us that a greater requirement is necessary as to notice complying with constitutional requirements of due process where no award has been given or made than where an award had been actually made. In fact, no method of appraisal has been set forth and an award permitted if there has been no appearance in the proceeding and the claim presented. Therefore, it seems to us that the appellee had a greater constitutional burden of searching out the various owners to give them proper notice of the proceeding.

Under this statute (Water Supply Act) unless there has been a claim filed, no method of appraisal or award is available as the statute had been construed by the lower courts.

> See *Richle vs. Board of Water Supply, City of New York*, 15 A. D. 2d 931, 226 N. Y. S. 2d 295.

Point "I" in *Richle vs. Board of Water Supply, supra*, raised that point properly and this contention had been

overruled by the Appellate Division, Second Department, after the decision in this case by the Court of Appeals of the State of New York.

In the *Walker* case, an award had been made and actually given but the claimant had not been satisfied with the amount of the award and this Court held that even though an award had been made it was not proper and had reversed the lower court.

The dissenting opinion of Mr. Justice Frankfurter in the *Walker* case likewise bears out our contention. There Mr. Justice Frankfurter stated:

> "Once appellant discovered that his land had been condemned and that the time for appeal from the award of the commissioners had passed, various possible courses of action, followed separately or in combination and each raising different issues, were open to him. If he considered the award fair but still desired to keep his land, he could have contended that unconstitutionality of the notice for the hearing on compensation invalidated the taking. If he considered the award unfair, he could have alleged in an appropriate action the unconstitutionality of the notice of the compensation hearing and the inadequacy of the compensation and sought to obtain fair compensation, see *Ward v. Love County*, 253 U. S. 17, or to restrain entry onto his land until he received a hearing under Kan. Gen. Stat., 1949, Sections 26-202, or, making a further allegation of the invalidity of the taking, to obtain a permanent injunction. At this stage, it is not relevant for me to imply any opinion on the merits of any of these possible courses of action.
>
> "On a fair reading of the complaint, appellant chose to pursue only the first course. The theory of this action, an attempt to restrain the city from trespassing on his land, is that he still has the right of possession. His petition for injunction based this right to possession solely on the allegation

that the statutory notice was insufficient. Nowhere in his petition for an injunction does appellant make any factual allegation that the money deposited by the commissioners did not represent the fair value of his land and therefore did not leave him out of pocket. Nowhere did he indicate that he wanted an injunction only until he received a hearing. The whole theory of his petition is that the property that was being taken without due process of law was his land not its money value.

* * * * * * * *

"In my view, the only constitutional question raised by appellant is whether failure to give adequate notice of the hearing on compensation of itself invalidates the taking of his land, apart from any claim of loss. * * *

"Appellant must be able to show that the provisions for payment as they operated in his case were inadequate before he can attack the Kansas statutory scheme for compensation in condemnation cases. See *Ashwander vs. T. V. A.*, 297 U. S. 288, 347 and cases cited n. 6 (Brandeis, J., concurring) cf. *Smith v. Indiana*, 191 U. S. 138, 148-149. Since on the record before us the compensation was not alleged to be inadequate, the taking was valid and the judgment of the Kansas Supreme Court should be affirmed. * * *

"Without intimating any opinion whether in the circumstances of this case appellant was denied the due process required in determining fair compensation for property taken under the power of eminent domain, I feel constrained to point out that the Court's decision does not hold the taking itself invalid and therefore does not require the Kansas court to grant an injunction so long as appellant's rights are protected."

We submit as to each mapped parcel, the Commissioners of Appraisal should be required to make an award.

The Constitution requires; in the taking of private property, that there be adequate notice to comply with due process, and also just compensation.

This Water Supply Act, consequently, aside from the question of notice, is also repugnant to the Constitution in that it permits the taking of private property without compensation of any kind if the claim is not timely filed.

There is no reason that the Commissioners could not have made an award to Miss Schroeder even though no claim was filed. Her property was shown on the taking map, and her name listed thereon (see map, Exhibit "A" in exhibit file).

The Statute in Question Should Not be Preserved for Its Many Defects.

The Court will note, for example, that the appellee has paid no attention in this proceeding to up-land owners having rights of way in their deeds to the beneficial use of the river. This is so despite the fact that the appellee's deed studies would reveal these easements to which various numbered parcels are servient. These up-land parcels were not mapped, numbered, nor were the names of the owners mentioned in any proceedings. Yet, these property owners, who were completely ignored in this proceeding, have been subjected to the short statute of limitations despite the fact that the Water Supply Act provides that title shall only vest in the City upon those parcels which are shown on the map (see Title K 41-11.0 of the Water Supply Act; see also *Application of Hale [Neilson]*, 6 A. D. 2d 837, 176 N. Y. S. 2d 193).

Furthermore, there is no provision anywhere in the Water Supply Act for indexing the rights acquired by

appellee in any County Clerk's Office as against any property owner. Consequently, a title search against property sold after title has vested in the City fails to reveal the interests in said property acquired by appellee. This, then, leads to the situation where there is a contest as to which title is paramount, that acquired by the bona fide purchaser for value and without notice on the one hand, or the appellee on the other.

There is no notice of any kind that can conceivably be had by a mortgagee of riparian property. Also, should there not be some protection to guard the rights of infants and incompetents to proprietary interests in the property being taken? This wholly inadequate statute makes no provision whatever to guard such rights or to protect those who, under the law, are incapable of protecting themselves.

The writer of this brief and the law firms represented, without repeating the arguments in the brief of appellant, join wholeheartedly in her claim that the conduct of the appellee in the taking of property under this statute was unconscionable and with the deliberate attempt to obtain private property without paying for it. A municipality should certainly be held to a higher standard of conduct particularly where it is taking property *in invitum*.

For these reasons we submit that the order and judgment appealed from should be reviewed and reversed by this Honorable Court and the case remanded to the State Court so that just and fair compensation can be paid to this appellant and others similarly situated.

Respectfully submitted,

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